UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	Civil Action No. 99-02496 (GK)
PHILIP MORRIS INCORPORATED, et al.	)	Next scheduled court appearance 5/26/00
Defendants.	)	

UNITED STATES' OPPOSITION TO DEFENDANT LIGGETT GROUP, INC.'S MOTION TO DISMISS

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Rules

Legislative Matters

The United States respectfully submits this memorandum in opposition to defendant Liggett Group Inc.'s motion to dismiss Counts Three and Four of the complaint pursuant to Fed. R. Civ. P. 12(b)(6) ("Rule 12(b)(6)"). As discussed more fully below, Liggett's motion -- which seeks to interject facts outside the scope of the complaint as a basis for dismissal -- confuses the government's burden at trial with the pleading requirements of Fed. R. Civ. P. 8 ("Rule 8"). The detailed allegations of unlawful conduct committed by defendants, including Liggett, and the government's specific averment that relief is necessary to restrain future misconduct more than adequately satisfy the government's burden of pleading a claim for equitable relief pursuant to the civil provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68. Further, Liggett's legal arguments about the appropriate scope of equitable relief are wrong as a matter of law and, in any case, are premature for resolution on a motion to dismiss. For these and other reasons as discussed below, Liggett's motion should be denied.

STATEMENT OF FACTS

On September 22, 1999, the United States filed a complaint against defendant Liggett Group, Inc.[1] ("Liggett") and ten other defendants pursuant to the Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653 (Count I), the Medicare Secondary Payer provisions of Subchapter 18 of the Social Security Act, 42 U.S.C. § 1395y(b)(2)(B)(ii) & (iii) (Count II), and the civil provisions of RICO, 18 U.S.C. §§ 1961-1968 (Counts III and IV). This action was filed: (1) to recover the health care costs borne by the federal government for expenditures for care of individuals with certain tobacco-related illnesses; (2) to restrain the defendants and their coconspirators from

[1/] Liggett Group, Inc. includes its predecessors in interest Liggett & Myers, Inc., and Liggett and Myers Tobacco Co., Inc.

engaging in further fraudulent and unlawful conduct; and (3) to compel the defendants to disgorge the proceeds of their unlawful conduct. Complaint For Damages And Injunctive and Declaratory Relief ("Compl.") ¶ 2. In its complaint, the United States makes the following allegations concerning Liggett's involvement in the RICO enterprise alleged in Counts Three and Four :

For well over 45 years, defendant Liggett has been an entrenched member of the tobacco industry, having manufactured, advertised, and sold cigarettes, both brand name and generic, in the District of Columbia and nationally. Id., ¶ 14. Several decades ago, to preserve and maintain its tobacco profits, Liggett joined with its major competitors in an enterprise that was dedicated to sustaining and expanding tobacco profits by transmitting to the public fraudulent information and statements about the health effects of tobacco; concealing documents and designing research to hide the nature of their fraudulent scheme; and marketing the products of its members to children. Id., ¶¶ 4, 5, 34, 41 & 173.

The RICO enterprise began at least as early as the 1950's when executives from several major tobacco companies united to combat then recent scientific discoveries and research that linked smoking to cancer. Id., ¶¶ 30, 37, 38 & 175. In 1953, with the understanding that such research could severely cripple their industry, the chief executives of defendants Philip Morris, Reynolds, Brown & Williamson, Lorillard, and American met at New York City's Plaza Hotel. Id., ¶¶ 31-33 & 175. At this meeting, those executives devised a "long-term" strategy, dependent upon concerted industry effort and funding, to counter the mounting evidence of the cigarette-cancer link by denying that smoking caused disease and by financing and promoting studies that were designed to reinforce the industry's position that the link between smoking and

disease was an “open controversy”or "open question," despite the industry’s knowledge to the contrary. Id., ¶¶ 34-37 & 175. What continued and grew from this meeting was an association-in-fact enterprise that functioned as a continuing unit for more than 45 years to protect the viability of tobacco products in the marketplace through a scheme of fraudulent and misleading practices. Id., ¶¶ 173-174 & 183.

Soon after the enterprise’s inception, Liggett joined and participated in it fully by adopting and assisting the specific goals that drove all of the enterprise’s illicit activities: (1) to preserve and enhance the market for cigarettes regardless of the truth, the law, or the adverse health consequences to its consumers; (2) to deceive consumers into starting or continuing to smoke by promoting the cigarette companies’ “open question” position concerning the health effects of smoking, despite its knowledge to the contrary; (3) to deceive consumers into starting or continuing to smoke by publicizing and voluntarily assuming an obligation to fund “independent” research to determine whether smoking causes cancer, while concealing and suppressing research adverse to its “open question” position and conducting biased research; (4) to deceive consumers into becoming addicted to cigarettes by claiming that nicotine is not addictive, while knowing, in truth and fact, that it is; (5) to deceive consumers into starting or continuing to smoke by manipulating the design of cigarettes and delivery of the nicotine, despite denials by its members that they engaged in such practices; and (6) to deceive consumers by claiming that its members did not target children, while in truth the enterprise members market cigarettes heavily to children in the hope of making them lifetime cigarette consumers. Id., ¶¶ 173-74. Additionally, Liggett contributed funding and resources to further the

enterprise's "long-term strategy" of fraudulent misrepresentations and counter-attacks to respond to threatening studies that suggested that smoking was hazardous. Id., ¶¶ 41 & 176-77.

As part of their efforts to implement the enterprise's goals and further its scheme to defraud, the defendant tobacco companies established organizations to assist the enterprise in its endeavors. Id., ¶ 184. Included among these were the Tobacco Institute ("TI") and the Tobacco Industry Research Committee, which later became the Council for Tobacco Research (TIRC/CTR). Id., ¶¶ 21, 22 & 184. Despite TIRC/CTR's claim of "independence," these two organizations, which were funded and controlled by the tobacco companies, acted in concert in bolstering the goals of the enterprise and were central places for the exchange of information among the enterprise members. Id., ¶ 184. Through these organizations and other entities, the enterprise members and their attorneys were in constant contact and were able to ensure that the "long-term" strategy of the enterprise was implemented; in fact, at times, both organizations employed the same law and public relations firms to further the enterprise. Id., ¶¶ 184-88.

TI and TIRC/CTR were separate but related tools of the enterprise. The enterprise members created TI to be their "propaganda arm," a public relations organization whose function was to make certain that defendants' false and misleading positions on issues related to, among other things, the connection between smoking and disease, were kept constantly before the public, doctors, the press, and the government. Id., ¶¶ 41,42 & 190. In particular, TI was instrumental in shielding the defendants' campaigns directed at children. Id., ¶¶ 93. Using TI, the defendants pledged to refrain from advertising to children. Id., ¶¶ 93 & 101-02. Yet, individually, enterprise members aggressively targeted children in their promotional campaigns. Id., ¶¶ 93 & 103.

In their flagship promise to the American public, the "Frank Statement to Cigarette Smokers," enterprise members billed TIRC/CTR as an institution headed by a scientist of "unimpeachable integrity and national repute" whose goal would be to aid and assist in "safeguard[ing] the public health." Id., ¶¶ 37 & 155. In truth and fact, however, TIRC/CTR was an organization run and funded by the cigarette companies to promote the defendants' fraudulent party line. Id., ¶¶ 37, 155 & 197-99. For the last 45 years, despite their knowledge about the strength of the cancer-cigarette link, the cigarette companies, including Liggett after it joined the enterprise, have consistently used TIRC/CTR studies and other resources to obscure legitimate scientific findings and to manufacture data to bolster and promote their fraudulent positions to regulatory, congressional and judicial agencies and cigarette consumers.
Id., ¶¶ 38, 39, 42, 43 & 197.

One of the most effective of ways in which the defendants, including Liggett, have used TIRC/CTR was through control and financing over "Special Projects," scientific studies designed to serve the defendants' public relations and litigation needs. Id., ¶ 64. These research projects were developed by the defendant tobacco companies to provide research funding for scientists and doctors who would provide study results and testimony favoring the tobacco industry's fraudulent stance on the "open controversy" of tobacco's health effects. Id., ¶ 64, 65 & 188. The bias of the studies was evident because of the fact that tobacco industry attorneys, instead of scientists and doctors, created "Special Projects," were actively involved in their management, and used attorney-client and work product privilege arguments to shield the "Special Projects" documents from civil discovery. Id., ¶¶ 68-69. Liggett, which joined TIRC/CTR in 1964, continually funded "Special Projects" throughout the course of its

participation in the enterprise and was a long time member of the Committee of Counsel and the Ad Hoc Committee, and the committee of industry attorneys who had a lead role in designing, funding, and monitoring the "Special Projects." Id., ¶¶ 188, 206 & Appendix, Racketeering Acts ("RAs") 17, 22, 31, 38, 66, 67, 70, 73 & 77.

In addition to "Special Projects," the defendant tobacco companies entered into a further agreement to limit and tailor their in-house research in furtherance of the "long-term" industry position. This agreement was not a formal contract, but instead was a secret "gentleman's agreement" not to conduct research on the health effects of smoking or to develop a "safer" cigarette. Compl., ¶¶ 45-47 & 146. Although this agreement was informal, it was not without powerful effect, as each member of the agreement enforced it against other members of the enterprise and their competitors. Id., ¶¶ 53-54. Instead of obtaining their own individual research statistics, the tobacco companies represented that all of their research on the health affects of smoking would be conducted by the "independent" TIRC/CTR. Id., ¶¶ 56-62. Any in-house research would be suppressed. Id., ¶¶ 48 & 183.

Liggett's own interaction with its fellow enterprise members illustrates the strong weight this informal agreement bore. Consistent with the tenets of the gentleman's agreement, Liggett developed but suppressed a product that it believed to be a less hazardous cigarette. Id., ¶¶ 107 & 111. Specifically, Liggett researchers doing tests during "Project XA" believed they had developed a means of discovering and excising the cancer-causing elements from cigarette smoke. Id., ¶ 107. However, even though Liggett believed that the Project XA cigarette would be commercially marketable, it suppressed the research that led to its development and never promoted the cigarette. Id., ¶ 112. The application of the "gentleman's agreement" to Project

XA was best witnessed by Liggett's assistant research director, Dr. James Mold, who said that Liggett's president reported that he was "told by someone in the Philip Morris Company that if we tried to market the [Project XA cigarette] that they would clobber us." Id., ¶ 111. Through industry-wide pressures, like the gentleman's agreement, the enterprise's close-knit tobacco companies, including Liggett, have managed to keep a tight reign on the flow of credible scientific information about tobacco products and defraud cigarette consumers and government agencies for almost half a century. Id., ¶ 173.

SUMMARY OF ARGUMENT

The United States has filed a detailed and particularized complaint against defendant Liggett and other tobacco companies alleging violations of RICO and appropriately seeks equitable relief, including disgorgement, which is available to the Attorney General pursuant to 18 U.S.C. § 1964(a) ("§ 1964(a)"). In its motion to dismiss, defendant Liggett makes two arguments in an attempt to defeat the complaint: first, Liggett attacks the core of the RICO violations by contending that the complaint fails properly to plead the enterprise and pattern of racketeering elements; and second, Liggett claims that disgorgement is not an available remedy under § 1964(a) because, according to Liggett, there is no basis to conclude it will engage in future unlawful activity.

Liggett's efforts to immunize itself from this lawsuit are, however, fundamentally flawed. First, Liggett raises issues wholly inappropriate for a motion to dismiss by asserting facts concerning an affirmative defense – its purported withdrawal from the RICO enterprise and conspiracy – that are beyond the face of the complaint and thus cannot serve as a basis for dismissal. Second, Liggett's claim that the United States has failed adequately to plead the

enterprise and pattern element of the RICO statute ignores both the legal requirements for pleading a RICO claim as well as the extensive specific details pled about the purposes, continuity and organization of the enterprise and Liggett's participation in unlawful racketeering acts committed in furtherance of it. The particularized allegations of past unlawful conduct, and the government's specific averment that relief is necessary to restrain future misconduct, are more than sufficient to satisfy pleading requirements to obtain equitable relief. Moreover, contrary to Liggett's arguments, the mail and wire fraud predicate acts are not defective for failure to plead convergence between the persons that defendants intended to deceive and defraud of money. The complaint plainly alleges that defendants intended to both deceive and obtain money from purchasers of cigarettes through the charged scheme to defraud. Finally, Liggett's claim that disgorgement is an inappropriate remedy is wrong as a matter of law because it ignores the plain language of RICO and its legislative history, which support using disgorgement, a forward-looking remedy that is instrumental in deterring criminal conduct, and, in any case, is premature for resolution in a Rule 12(b)(6) motion to dismiss.

ARGUMENT

I

LIGGETT'S ARGUMENTS DISREGARD THE GOVERNING STANDARDS OF REVIEW AND MAY NOT BE THE BASIS FOR DISMISSAL OF THE RICO CHARGES

Liggett argues (L. Mem. pp. 2, 16, 19-20) that Counts Three and Four must be dismissed on the ground that the government will not be able to prove that there is a reasonable likelihood that Liggett will commit similar unlawful conduct in the future because Liggett allegedly has ceased its charged unlawful conduct and has withdrawn from the charged RICO enterprise and

conspiracy. These arguments disregard the governing standards of review, and may not be the basis for dismissal of the complaint at this stage of the proceedings.

1. It is well settled that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."[2] As this Court observed in Service Employees Int'l Union Health and Welfare Fund, et al. v. Philip Morris Inc., et al., __ F. Supp. 2d __, 1999 WL 1314908, * 1 (D.D.C. Dec. 21, 1999) (hereinafter "Service Employees Int'l"), "motions to dismiss for failure to state a claim upon which relief can be granted are generally viewed with disfavor and rarely granted." In considering a motion to dismiss a complaint for alleged failure to state a claim, the court must presume the factual allegations in the complaint to be true and view them in the light most favorable to the plaintiff.[3] "Rule 12(b)(6) is not a device for testing the truth of what is asserted." ACLU Foundation of Southern California v. Barr, 952 F.2d 457, 467 (D.C. Cir. 1991). As the Supreme Court stated in Scheuer v. Rhodes:

> When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.

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[2] Conley v. Gibson, 355 U.S. 41, 45-46 (1957). Accord Caribbean Broadcasting System, LTD. v. Cable & Wireless PLC, 148 F.3d 1080, 1086 (D.C. Cir. 1998); Harris v. Ladner, 127 F.3d 1121, 1123 (D.C. Cir. 1997).

[3] See e.g., Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), abrogated on other grounds by Davis v. Sherer, 468 U.S. 183, 191 (1984); Harris, 127 F.3d at 1123; Shear v. National Rifle Ass'n of America, 606 F.2d 1251, 1253 (D.C. Cir. 1979).

416 U.S. 232, 236 (1974). Accord Caribbean Broadcasting System, LTD. v. Cable & Wireless PLC, 148 F.3d 1080, 1086 (D.C. Cir. 1998).

Furthermore, in determining whether the complaint is sufficient, the court is limited to consideration of the facts alleged in the four corners of the complaint. Shear, 606 F.2d at 1253; Caudle v. Thomason, 942 F. Supp. 635, 638 (D.D.C. 1996). Accordingly, a complaint may not be dismissed under Rule 12(b)(6) because of an affirmative defense unless "the defense clearly appears on the face of the complaint."[4]

It is also well established "that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley, 355 U.S. at 47, quoting Rule 8(a)(2).[5] Rule 8(a) does not require a complaint to "state facts or ultimate facts or facts sufficient to constitute a cause of action." United States v. Private Sanitation Industry Ass'n, 793 F. Supp. 1114, 1124 (E.D.N.Y. 1992) (internal quotations and citation deleted).[6] Instead, under Rule 12(b)(6), "plaintiffs. . .need only 'adduce a set of facts' supporting their legal claims in order to survive a motion to dismiss." Wells v. United States, 851 F.2d 1471, 1473 (D.C. Cir. 1988). For more details, a defendant must rely upon "the liberal opportunity for

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[4] Fortner v. Thomas, 983 F.2d 1024, 1028 (11th Cir. 1993). Accord Suarez Corp. Industries v. McGraw, 125 F.3d 222, 229 (4th Cir. 1997); Barr, 952 F.2d at 467.

[5] Accord Sinclair v. Kleindienst, 711 F.2d 291, 293 (D.C. Cir. 1983) ("'notice pleading' is sufficient").

[6] Accord Caribbean Broadcasting System, 148 F.3d at 1086 ("a plaintiff is not required to plead facts sufficient to prove its allegations.").

discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues." Conley, 355 U.S. at 47-48.

2. Ignoring these well-settled standards of review, Liggett improperly argues (L. Mem. pp. 2, 15-16, 19-20) that the RICO counts should be dismissed on the ground that the United States will not be able to prove a reasonable likelihood that Liggett will commit unlawful acts in the future since it allegedly has ceased its charged unlawful activities and has withdrawn from the charged RICO enterprise and conspiracy. However, it bears repeating that at this juncture, the issue is not whether the United States "will ultimately prevail"; rather, it is "whether the [United States] is entitled to offer evidence to support the claims." Scheuer, 416 U.S. at 236. Therefore, Liggett's arguments are premature and may not be the basis for dismissal of the complaint.

Rather than confining its argument to the four corners of the complaint, Liggett improperly seeks to raise an affirmative defense by arguing that it has ceased its charged unlawful activities and has withdrawn from the RICO enterprise and conspiracy. However, a coconspirator is presumed to remain a member of a conspiracy until either all of the objectives of the conspiracy have been fully achieved or the coconspirator proves that he withdrew from the conspiracy prior to its end. To establish such withdrawal, a coconspirator has the burden of proving more than mere cessation of his unlawful activities. Rather, a coconspirator must also prove either that: (1) he took "affirmative action . . . to disavow or defeat the purpose" of the

conspiracy which is communicated in a manner reasonably calculated to reach coconspirators, or (2) he disclosed the unlawful scheme to the authorities.[7]

Indeed, to support its asserted withdrawal defense Liggett relies upon extensive assertions of "fact" that are outside the complaint. Liggett's 14-page statement of facts consists of factual assertions almost entirely outside the complaint.[8] However, as this Court stated in Service Employees Int'l, 1999 WL 1314908, * 1, "at this stage of the proceedings [Rule 12 (b)(6) motion], the only relevant factual allegations are the plaintiffs," and the defendants' contrary

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[7] Hyde v. United States, 225 U.S. 347, 369 (1912). Accord United States v. United States Gypsum Co., 438 U.S. 422, 463-64 (1978); In Re Brand Name Prescription Drugs, 123 F.3d 599, 616 (7th Cir. 1997); United States v. Thomas, 114 F.3d 228, 267-68 (D.C. Cir. 1997) (collecting cases); In Re Corrugated Container Antitrust Litigation, 662 F.2d 875, 886 (D.C. Cir. 1981).

Moreover, contrary to Liggett's assertion (L. Mem. p. 4), it is immaterial that Liggett did not participate in the charged conspiracy from its beginning. It is well established that a conspirator "who joins an already formed conspiracy knowing of its unlawful purpose may be held responsible for acts done in furtherance of the conspiracy both prior to and subsequent to his joinder." United States v. Bridgeman, 523 F.2d 1099, 1108 (D.C. Cir. 1975). Accord United States v. Stewart, 104 F.3d 1377, 1382 (D.C. Cir. 1997). Further, a defendant may be liable for a conspiracy even though he did not participate in, and was not aware of, various acts in furtherance of the conspiracy. See, e.g., Aetna Casualty Surety Co. v. P & B Autobody, 43 F.3d 1546, 1562 (1st Cir. 1994); Bridgeman, 523 F 2d at 1108.

[8] For example, Liggett claims that the following "facts" establish its withdrawal from the RICO enterprise and conspiracy: (1) Liggett's CEO testified at various proceedings in a manner inconsistent with the objectives of the conspiracy (L. Mem. p. 2, 11, 14); (2) Liggett released internal documents relevant to smoking and health issues (Id., p. 9-11); (3) Liggett reduced its market share of tobacco products and no longer markets some premium brand cigarettes (Id., p. 3, 19); (4) Liggett agreed to FDA jurisdiction and has allegedly cooperated with the scientific community concerning smoking related issues (Id., p. 8-9, 12-13); (5) Liggett "has made a clean break with the rest of the tobacco company defendants" which claim Liggett "is no longer aligned" with them (Id., p. 5, 12-13, 15); and (6) Liggett has been complimented by government officials and others for its allegedly breaking ranks with the other tobacco companies (Id., p. 5-8, 11, 13-14).

factual allegations "must be ignored." (Citation deleted). Accordingly, at this stage, this Court must ignore Liggett's factual allegations that are outside the complaint.

Furthermore, if, at some later stage, Liggett satisfies its burden of going forward with evidence of its withdrawal from the RICO enterprise and conspiracy, the United States would be entitled to offer rebuttal evidence that after the alleged withdrawal Liggett: (1) engaged in conduct that either was consistent with or aided the objectives of the conspiracy; (2) attended conspiratorial meetings; (3) engaged in conspiratorial communications; (4) continued to benefit financially or otherwise from operations of the enterprise or the conspiracy; (5) had a continued stake in the success of the conspiracy; or (6) did not make full disclosure of the unlawful conspiracy to the authorities.[9]

Since it is clear that Liggett's affirmative defense attempts to advance a factual contention that cannot be resolved at this stage, it may not be the basis for dismissal of the complaint pursuant to Rule 12(b)(6) before the United States has had the benefit of discovery and an opportunity to adduce evidence to rebut it. Accord cases cited supra, n. 4. Therefore, at this stage of the proceedings, this Court must ignore Liggett's premature claim of withdrawal from the RICO enterprise and conspiracy.

3. Finally, defendant Liggett's contention (L. Mem. pp. 18, 19 & 20) that the United States is not entitled to relief because the complaint focuses on allegations of past and supposedly discontinued violations not only ignores Rule 12(b)(6) but also is flawed both

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[9] See, e.g., United States v. Diaz, 176 F.3d 52, 98-99 (2nd Cir. 1999); United States v. Antar, 53 F.3d 568, 582-83 (3rd Cir. 1995); United States v. Minicone, 960 F.2d 1099, 1108 (2nd Cir. 1992); United States v. Phillips, 664 F.2d 971, 1017-18 (5th Cir. 1981); United States v. Lowell, 649 F.2d 950, 957-58 (3rd Cir. 1981); United States v. Agueci, 310 F.2d 817, 838 (2nd Cir. 1962).

factually and legally. First, as discussed above, defendant's asserted facts supporting its supposed cessation are outside the parameters of the complaint and may not form the basis of a dismissal. Second, even assuming the facts "pled" in Liggett's motions to dismiss, such cessation does not automatically preclude the need for injunctive relief. As the Supreme Court and other federal courts have observed, mere "cessation of violations . . . is no bar to the issuance of an injunction" because past violations are "highly suggestive of the likelihood of future violations."[10]

In that regard, the District of Columbia Circuit and other federal courts have held that evidence of past violations may establish the requisite reasonable likelihood of future violations in view of the totality of the circumstances, particularly where the defendants' past violations were: (1) "part of a pattern" and not isolated; (2) were "deliberate" and not "merely technical in nature;" and (3) "the defendant's business will present opportunities to violate the law in the future."[11] Accordingly, a claim for equitable relief is sufficiently pled by an allegation that,

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[10/] Hecht Co. v. Bowels, 321 U.S. 321, 327 (1944); S.E.C. v. Management Dyn., Inc., 515 F.2d 801, 807-08 (2nd Cir. 1975). Accord City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 and n.10 (1982); United States v. Parke, Davis & Co., 362 U.S. 29, 47-49 (1960); United States v. Odessa Union Warehouse Co-Op., 833 F. 2d 172, 176 (9th Cir. 1987); Campbell v. McGruder, 580 F. 2d 521, 540 (D.C. Cir. 1978); S.E.C. v. Commonwealth Chemical Securities, Inc., 574 F. 2d 90, 98-99 (2nd Cir. 1978); Pullum v. Greene, 396 F. 2d 251, 256-57 (5th Cir. 1968).

[11/] S.E.C. v. First City Financial Corp., Ltd., 890 F.2d 1215, 1228-29 (D.C. Cir. 1989). Accord S.E.C. v. Bilzerian, 29 F.3d 689, 695 (D.C. Cir. 1994); Commodity Futures Trading Com'n. v. Hunt, 591 F.2d 1211, 1220-21 (7th Cir. 1979); Com. Chemical, Etc., 574 F.2d at 98-100; Management Dyn., Inc., 515 F.2d at 807-08; S.E.C. v. Advance Growth Capital Corp., 470 F.2d 40, 53 (7th Cir. 1972).

Moreover, where the United States seeks equitable relief to protect the public against wrongdoing, as here, the United States need not show an inadequate remedy at law, irreparable injury, or that the harm suffered in the absence of injunctive relief outweighs the harm the

(continued...)

unless the defendants are enjoined, there is a likelihood that they will commit future violations similar to the past violations alleged in the complaint.[12]

Consistent with this understanding, in many civil RICO cases, courts have granted the United States injunctive and other equitable relief, as sought here, based on past violations, and have rejected more compelling arguments than the defendant makes here that injunctive relief was not necessary because the unlawful activity had supposedly ceased. In these cases, courts ordered injunctive relief even though many of the wrongdoers had been convicted of crimes and were not in a position to continue their unlawful conduct because they were imprisoned or removed from office in the corrupt enterprise.[13]

It is thus clear that the complaint's allegations are more than sufficient to support the claim for equitable relief. The complaint alleges with particular detail that Liggett was an active

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[11/](...continued)
defendant will suffer if the injunction is granted. See, e.g., United States v. City of San Francisco, 310 U.S. 16, 30-31 (1940); Hunt, 591 F.2d at 1220; United States v. Cappetto, 502 F.2d 1351, 1358 (7th Cir. 1974); S.E.C. v. Stratton Oakmont Inc., 878 F. Supp. 250, 255 (D.D.C. 1998). See also cases cited infra, n.13.

[12/] See, e.g., Commodity Futures Trading Commission v. Incomco, Inc., 649 F.2d 128, 132 and n. 4 (2nd Cir. 1981); S.E.C. v. Cassano, 61 F. Supp. 2d 31, 34 (S.D.N.Y. 1999); S.E.C. v. Davis, 689 F. Supp. 767, 772 (S.D. Ohio 1988). Cf. United States v. Waste Industries, Inc., 734 F.2d 159, 168 (4th Cir. 1984).

[13/] See, e.g., United States v. Carson, 52 F.3d 1173, 1183-85 (2nd Cir. 1995); United States v. Private Sanitation Industry Ass'n., 995 F.2d 375, 377-78 (2nd Cir. 1993); United States Local 30, United Slate Tile, et, al., 871 F.2d 401, 405-09 (3rd Cir. 1989); United States v. Local 295 of International Brotherhood of Teamsters, 784 F. Supp. 15, 18, 21-22 (E.D.N.Y. 1992); United States v. Local 30, United Slate, Tile et, al., 686 F. Supp. 1239, 1262-74 (E.D. Pa. 1988), aff'd, 871 F.2d 401 (3rd Cir. 1989); United States v. Ianniello, 646 F. Supp. 1289, 1299-1300 (S.D.N.Y. 1986); United States v. Local 560, International Brotherhood of Teamsters, et. al., 581 F. Supp. 279, 319-326 (D. N.J. 1984), aff'd. 780 F.2d 269, 292-94 (3rd Cir. 1986); United States v. Mason Tenders District Council, 1995 WL 679245, at * 7-13 (S.D.N.Y. Nov. 15, 1995).

participant along with its coconspirators in the numerous past violations of the enterprise which were committed as part of an extensive pattern of racketeering that spanned over 45 years. The complaint further alleges that Liggett and its codefendants committed these violations deliberately and pursuant to an overall scheme to defraud purchasers of cigarettes. Defendant Liggett is still in the business of selling cigarettes which will present opportunities to violate the law in the future. Also, the complaint alleges that unless the requested relief is granted, the defendants are likely to continue their pattern of unlawful conduct. Compl., ¶¶ 208-10. To be sure, these allegations create a sufficient inference of the requisite reasonable likelihood of future violations, and adequately support the government's claim for equitable relief. Accordingly, defendant Liggett's motion to dismiss should be denied.

II

THE RICO COUNTS ADEQUATELY ALLEGE THE ENTERPRISE ELEMENT

Liggett contends (L. Mem. pp. 24-26) that the RICO counts must be dismissed pursuant to Rule 12(b)(6) on the ground that they fail to allege that the RICO enterprise had an "ascertainable organization or structure." Specifically, Liggett argues (L. Mem. p. 26):

> [T]he complaint neither identifies a leader of the association nor alleges that leadership responsibilities were shared among identifiable members of the alleged association-in-fact, it provides no indication of how the association reached decisions to undertake the racketeering acts alleged or how disagreements among the differently interested members of the association were resolved; it offers no mechanism by which the alleged association could reward members for adherence to the conspiracy's objections or discipline those who strayed.

Liggett is wrong. As a legal matter, neither RICO nor the Federal Rules of Civil Procedure require a complaint to allege such evidentiary details to survive a motion to dismiss (see supra, pp. 9-10). The government has sufficiently alleged the existence of defendants' association-in-fact enterprise. In any event, Liggett is also wrong as a matter of fact, because the complaint alleges specific details about the common purposes, organization and continuity of the enterprise, even though such detail is not required.

1. 18 U.S.C. § 1961 (4) provides:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.

Pursuant to this definition, an association-in-fact enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583 (1981). Accord United States v. Perholtz, 842 F.2d 343, 363 (D.C. Cir. 1988) ("The enterprise is established by (1) a common purpose among the participants, (2) organization, and (3) continuity"); United States v. Richardson, 167 F.3d 621, 625 (D.C. Cir. 1999) (same); United States v. White, 116 F.3d 903, 924 (D.C. Cir. 1997) (same).

Although these attributes of an enterprise -- purpose, organization, and continuity -- must be **proved** to establish RICO liability, these evidentiary details need not be **pleaded** in a complaint. See, e.g., Seville Industrial Machinery Corp. v. Southmost Machinery, 742 F.2d 786, 789-90 (3rd Cir. 1984); Federal Insurance Co. v. Ayers, 741 F. Supp. 1179, 1183 (E.D. Pa. 1990). Indeed, the District of Columbia Circuit and other courts have consistently held that a group of

legal entities and individuals, as alleged in Counts Three and Four (see Compl. ¶¶ 173-199, 202), may constitute a RICO enterprise as a "group of individuals associated in fact."[14] None of these cases require pleading the detailed allegations about the operations of an enterprise advanced by Liggett.

For example, in Perholtz, the District of Columbia Circuit upheld the adequacy of the following allegation of a RICO enterprise:

> Defendant ROLAND J. PERHOLTZ, defendant FRANKLIN W. JACKSON, [and other listed individuals and corporations] constituted an enterprise, as that term is defined by Title 18, United States Code, Section 1961(4) to wit, a group of individuals, partnerships, and corporations associated in fact to unjustly enrich themselves from the proceeds of government contracts and subcontracts, for computer services and equipment, which had been and would be obtained by means of bribery, fraud, and circumvention of government contracting procedures designed to secure for the United States government the benefits of competition.

842 F.2d at 351, n.12 and 352-53. Moreover, in Private Sanitation Industry Ass'n, 793 F. Supp. at 1120, 1126, the United States brought a civil RICO lawsuit for equitable relief against 112 defendants, including numerous corporations and various individuals, who for several decades

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[14] See e.g., Perholtz, 842 F.2d at 351, n. 12 (10 corporations and seven individuals); Securiton Magnalock Corp. v. Schnabolk, 65 F.3d 256, 262-64 (2nd Cir. 1995) (two corporations and their principal officer); United States v. Masters, 924 F.2d 1362, 1366 (7th Cir. 1991) ("an informal consortium of a law firm and two police departments with the three individuals who are the defendants"); United States v. Ofchinick, 883 F.2d 1172, 1175 (3rd Cir. 1989) (four corporations and two individuals); Ocean Energy II, Inc. v. Alexander and Alexander, Inc., 868 F.2d 740, 748-49 (5th Cir. 1989) (six corporations and an individual); United States v. Feldman, 853 F.2d 648, 656-57 (9th Cir. 1988) (five corporations and two individuals); United Energy Owners v. United Energy Management, 837 F.2d 356, 362-63 (9th Cir. 1988) (a group of approximately 9 corporations and 26 individuals); United States v. Thevis, 665 F.2d 616, 625-26 (5th Cir. 1982) (a group of corporations and individuals).

had corruptly controlled, run and influenced the solid waste disposal industry in Long Island, New York. The court stated:

> [Under] the Second claim, the enterprise is alleged to be "a group composed of, but not limited to" all the named defendants "associated-in-fact for the purpose of controlling the waste disposal industry on Long Island". . . As a matter of pleading, this allegation is adequate to assert that the carting industry enterprise is indeed an "enterprise" for purposes of RICO.

793 F. Supp. at 1126-27. Similarly, in United States v. International Brotherhood of Teamsters, 708 F. Supp. 1388 (S.D.N.Y. 1989), the United States brought a civil RICO lawsuit for equitable relief against the International Brotherhood Teamsters Union, its General Executive Board members, the ruling Commission of La Cosa Nostra (LCN) and 26 members and associates of the LCN. The complaint (¶ 53) alleged the RICO enterprise as follows:

> The Teamsters International Union and various of its Area Conferences, Joint Councils, Locals and Benefit funds have collectively constituted an enterprise.

The court held that this allegation adequately pled on association-in-fact enterprise. 708 F. Supp. at 1392, 1401.

As the court said in Water International Network, U.S.A. Inc. v. East, 892 F. Supp. 1477, 1482 (N.D. Fl. 1995), "[t]o plead the existence of an enterprise, it is sufficient simply to identify it." Thus, it is clear that there is no legal basis for the heightened pleading standard that Liggett seeks to create in its motion to dismiss.

2. In any event, the complaint's allegations include many particulars about the RICO enterprise's common purposes, organization, and continuity even though such details are not required to be pleaded. For example, the RICO counts allege that the RICO enterprise is an

association-in-fact consisting of the eleven corporate defendants and others, including their agents and employees. Compl., ¶ 173. The complaint also alleges that the "[e]nterprise functioned as a continuing unit for more than 45 years to achieve shared goals through unlawful means"; and these goals are specified in the complaint. Id., ¶ 174. The complaint describes the alleged origins of the enterprise and the manner and means the enterprise used over the years to function as a continuing unit to achieve the shared purposes of the members of the enterprise. Id., ¶¶ 175-181, 184, 198. Moreover, the complaint alleges that the enterprise has an ascertainable structure separate from the racketeering acts and a "consensual decision making structure" as follows:

> At all relevant times, the Enterprise has existed separate and apart from defendants' racketeering acts and their conspiracy to commit such acts. The Enterprise has an ascertainable structure and purpose beyond the scope and commission of defendants' predicate acts. It has a consensual decision making structure that is used to coordinate strategy, manipulate scientific data, suppress the truth about the consequences of smoking, and otherwise further defendants' fraudulent scheme.

Id., ¶ 182. The complaint's allegations further detail how the defendant tobacco companies created, funded, and actively controlled TIRC/CTR and TI, and how defendants used those entities as central components of the enterprise to formulate and implement the decisions of the enterprise to manipulate scientific data, suppress the truth about the consequences of smoking, and to otherwise further the fraudulent objectives of the defendants and their enterprise. Id., ¶¶ 185-199.

In view of these numerous and detailed allegations about the purposes, organization, and continuity of the enterprise, Liggett's argument that they are deficient is meritless. Indeed,

courts have frequently approved in civil RICO cases allegations of a RICO enterprise that are considerably less detailed than these allegations.[15]

III

THE RICO COUNTS ADEQUATELY ALLEGE THE PATTERN ELEMENT

Liggett argues (L. Mem. pp. 26-33) that the RICO counts fail properly to allege a pattern of racketeering activity on the ground that the mail and wire fraud predicate acts are defective because: (1) they do not allege that the defendants deceived consumers of cigarettes or caused or contemplated harm to their business or property, but rather alleges that "consumers 'suffer[ed] dangerous diseases and injuries.' (Compl. ¶ 6)." (L. Mem. p. 27); (2) they do not allege a convergence between the individuals deceived and the individuals allegedly defrauded because, in Liggett's view, the complaint alleges that consumers of cigarettes were deceived whereas the United States was the victim defrauded of money and property; and (3) they fail to plead any misrepresentation of fact and to satisfy the particularity requirements of Rule 9(b).

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[15] See, e.g., Fleischhauer v. Feltner, 879 F.2d 1290, 1295-97 (6th Cir. 1989); Shearin v. E.F. Hutton Group, Inc., 885 F.2d 1162, 1165-66 (3rd Cir. 1989); United Energy Owners v. United Energy Management, 837 F.2d 356, 361-62 (9th Cir. 1988); Center Cadillac v. Bank Leumi Trust Co., 808 F. Supp. 213, 234-35 (S.D.N.Y. 1992), aff'd 99 F.3d 401 (2nd Cir. 1995) ; American Trade Partners, L.D. v. A-1 International Importing Enterprises, Ltd., 755 F. Supp. 1292, 1299 (E.D. Pa. 1990); Federal Insurance Co., 741 F. Supp. at 1183; Morley v. Cohen, 610 F. Supp. 798, 811 (D. Md. 1985); Beth Israel Medical Center v. Smith, 576 F. Supp. 1061, 1068 (S.D.N.Y. 1983). See also, cases cited supra, p. 18-19.

Liggett's reliance (L. Mem. p. 26) upon Vandenbroeck v. Commonpoint Mortgage Co., 22 F. Supp. 2d 677, 682 (W.D. Mich. 1998), is misplaced. In that case, the complaint did not contain any "allegation, even in conclusory form, showing that an organizational pattern or system of authority . . . provided a mechanism for directing the group's affairs on a continuing, rather than an ad hoc basis" (internal quotations and citation deleted). The complaint's allegations here, in contrast, fully detail the organization, continuity, and operations of the enterprise.

All these arguments are based on a misreading of the complaint and are both factually and legally flawed. First, the mail and wire fraud statutes do not require either allegations or proof that a defendant succeeded in defrauding his intended victim of money or property or caused him any harm. Rather, these statutes require **only** that the defendant **intended** to defraud a victim of money or property. The complaint plainly alleges that the defendants intended to defraud consumers of cigarettes of money and property (see Compl. ¶ 204), and hence alleges a convergence between the victims the defendants intended to deceive and defraud of money. Moreover, the complaint is replete with allegations of misrepresentations of fact which are amply sufficient to satisfy the requirements of Rule 9(b).

A. The Mail And Wire Fraud Predicate Acts Are Properly Alleged

1. The mail fraud statute, 18 U.S.C. § 1341, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or artifice or attempting so to do, [mails or causes the mailing of any matter] . . . shall be fined under this title or imprisoned not more than five years, or both.

To establish an offense under § 1341, the government **must prove** the following elements:

1. The defendant knowingly devised or intended to devise any scheme or artifice to defraud a victim of money or property, **or** the defendant knowingly devised or intended to devise any scheme for obtaining money or property by means of material false or fraudulent, representatives pretenses, or promises, **and**

2. The defendant mailed any matter, or knowingly caused the mailing of any matter, for the purpose of furthering or executing such scheme or artifice, **and**

1. The defendant acted with the specific intent to defraud or deceive.[16]

In Durland v. United States, 161 U.S. 306 (1896), the Supreme Court ruled that the mail fraud statute broadly covers all intentional schemes to defraud. Id. at 314. It therefore rejected the defendant's contention that the mail fraud statute "reaches only such cases as, at common law, would come within the definition of 'false pretenses,' [which requires] a misrepresentation as to some existing fact and not a mere promise as to the future." Id. at 312. Rather, the Court held that the statute encompasses "everything designed by representations as to the past or present, or suggestions and promises as to the future. The significant fact is the intent and purpose." Id. at 313. Since intent to defraud is the central element, the Court concluded that a mail fraud offense did not require proof that the mailing was

> effective in carrying out the fraudulent scheme. It is enough if, having devised a scheme to defraud, the defendant with a view of executing it deposits in the post office letters, which he thinks may assist in carrying it into effect, although in the judgment of the jury they may be absolutely ineffective therefore.

Id. at 315.

In accordance with the Supreme Court's expansive reading of the mail fraud statute, the District of Columbia Circuit and other courts have consistently held that to establish a mail fraud violation a plaintiff is not required to prove that: (1) the wrongdoer succeeded in deceiving or

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[16] See, e.g., Pereira v. United States, 347 U.S. 1, 8-9 (1954); United States v. Trapilo, 130 F.3d 547, 551-52 (2nd Cir. 1997); United States v. Sawyer, 85 F.3d 713, 723 (1st Cir. 1996); United States v. Manzer, 69 F.3d 222, 226 (8th Cir. 1995).

Because the wire fraud statute, 18 U.S.C. § 1343, was patterned after the mail fraud statute and has virtually identical language, courts have construed them identically. Accordingly, all references herein to the required elements of the mail fraud statute also apply to the wire fraud statute, and vice-versa. See, e.g., Sawyer, 85 F.3d at 723; Manzer, 69 F.3d at 226; United States v. Griffith, 17 F.3d 865, 874 (6th Cir. 1994); United States v. Rafsky, 803 F.2d 105, 107-08 (3rd Cir. 1986); United States v. Lemire, 720 F.2d 1327, 1335 n.6 (D.C. Cir. 1983).

defrauding the intended victim; (2) the victim suffered any loss of money, property, or other harm; or (3) the intended victim detrimentally relied upon the wrongdoer's fraudulent misconduct.[17] Rather, it is sufficient that the totality of the circumstances demonstrates that the defendant intentionally devised or participated in a scheme reasonably calculated to deceive with the purpose of obtaining or depriving another or money or property.[18]

Therefore, contrary to Liggett's arguments, the mail and wire fraud predicate offenses need not allege, nor is the government required to prove, that the intended victims of the defendants' scheme to defraud suffered any financial loss or other injury to their property

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[17] See e.g., Neder v. United States, 119 S.Ct. 1827, 1841 (1999) ("The common-law requirements of 'justifiable reliance' and 'damages'. . . plainly have no place in the federal fraud statutes."); Carpenter v. United States, 484 U.S. 19, 26-27 (1987) ("Petitioners cannot successfully contend . . . that a scheme to defraud [under mail and wire fraud statutes] requires a monetary loss."); Trapilo, 130 F.3d at 552 (the wire fraud statute proscribes a wire transmission "in furtherance of a scheme whereby one **intends** to defraud another of property. Nothing more is required. The identity and location of the victim and the success of the scheme are irrelevant.") (emphasis in original); United States v. Bryan, 58 F.3d 933, 943 (4th Cir. 1995) ("'the fraud need not succeed' for a defendant to be convicted of wire fraud."); United States v. Frey, 42 F.3d 795, 800 (3rd Cir. 1994) ("this court has stated that the success of the scheme is not relevant in a mail or wire fraud conviction; it is sufficient that the defendant had the intent to defraud."); Griffth, 17 F.3d at 874 ("detrimental reliance is not one of the two elements of wire fraud."); Borre v. United States, 940 F.2d 215, 222 (7th Cir. 1991) (to prove mail fraud it "is not necessary that a plan actually result in financial loss"); United States v. Oren, 893 F.2d 1057, 1061, 1063 (9th Cir. 1990) (wire fraud statute does not require "an actual loss" and "reliance is not a necessary element of the wire fraud offense."); United States v. Stewart, 872 F.2d 957, 960 (10th Cir. 1989) ("the government does not have to prove actual reliance upon the defendant's misrepresentations nor do they have to prove that the victim suffered actual pecuniary losses from the scheme."); United States v. Pollack, 534 F.2d 964, 971 (D.C. Cir. 1976) (the mail and wire fraud statutes "do not require that the deception bear fruit for the wrongdoer or cause injury to the intended victim").

[18] See, e.g., McEvoy Travel Bureau, Inc., v. Heritage Travel, Inc., 904 F.2d 786, 791-92 (1st Cir. 1990); Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986, 991-92 (8th Cir. 1989); United States v. Pearlstein, 576 F.2d 531, 535 (3rd Cir. 1978).

interests.[19] Rather, in accordance with the foregoing authority, the mail and wire fraud predicate offenses properly allege that the defendants devised a scheme with intent to defraud purchasers of cigarettes of their money and property. For example, the complaint incorporates the following sub-paragraph into each of the charged 116 mail and wire fraud predicate offenses:

> From at least as early as December 1953, and continuing until the time of filing of this complaint, in the District of Columbia and elsewhere, **defendants and others known and unknown did knowingly and intentionally devise and intend to devise a scheme and artifice to defraud, and obtain money and property from members of the public** by means of material false and fraudulent pretenses, representations, and promises, and omissions of material facts, knowing that the pretenses, representations, and promises, were false when made. (emphasis added).[20]

Compl., ¶ 204 (a). The complaint further incorporates into each charged predicate offense numerous sub-paragraphs that allege in detail the manner and means the defendants used in furtherance of their fraudulent scheme to obtain money from the purchasers of cigarettes

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[19/] Although to establish the defendants' liability for violations of the mail, wire fraud and RICO statutes the government is not required to prove that consumers of cigarettes suffered any financial loss, to obtain disgorgement the United States is required to establish that the disgorged property is "causally related to the wrongdoing." First City Financial Corp., Ltd., 890 F.2d at 1231. However, the standards for calculating the amount of disgorgement are flexible; "disgorgement need only be a reasonable approximation of profits causally connected to the violation." Id. Thus, there is a fundamental distinction between the proof required to establish **liability** for a violation of the mail and wire fraud statutes and the proof required to obtain **relief** in the form of disgorgement. At an appropriate subsequent stage of these proceedings, the United States will fully address the calculation of the money to be disgorged.

[20/]Liggett mistakenly relies (L. Mem. p. 27) on ¶6 of the complaint which states, in relevant part: "Defendants' tortious and unlawful course of conduct has caused consumers of defendants' products to suffer dangerous diseases and injuries." This allegation does not underly the RICO counts but rather underlies Counts One and Two. See Compl., ¶ 171. As noted, the RICO counts are premised on the claim that the defendants intended to obtain money from consumers of cigarettes through defendants' fraudulent sale of cigarettes to consumers.

through false and misleading statements and other deceitful misconduct. Compl., ¶ 204(a) -(n). No greater pleading is required.[21]

These allegations also make clear that the complaint alleges a convergence between the individuals the defendants intended to deceive and the individuals from whom they endeavored to obtain money; in both cases the intended victims are purchasers of cigarettes. In sum, Liggett's contentions that the mail and wire fraud allegation are fatally defective are contrary to settled law and are premised on a misinterpretation of the complaint.[22]

B. The Mail and Wire Fraud Allegations Satisfy Rule 9(b)

There is no merit to Liggett's argument (L. Mem. p. 31-33) that the RICO charges must be dismissed on the ground that the mail and wire fraud predicate offenses fail to satisfy the particularity requirements of Rule 9(b), because they do not allege misrepresentations of facts.

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[21] In any event, the mail and wire fraud predicate acts allege that the defendants succeeded in obtaining money and profits from the sale of cigarettes to consumers through the charged scheme to defraud. See Compl., ¶¶ 204(b) - (d).

[22] We hasten to add that Liggett has also misinterpreted the RICO counts' allegations about the defendants' efforts to deceive the government. Those allegations merely reference matters that are part of the defendants' overarching scheme to defraud consumers of cigarettes. (see, e.g., Compl. 17 ¶¶ 204(d) - (f)). Obviously, in order to maintain the efficacy of their effort to deceive consumers, the defendants had to endeavor to deceive the government, especially since the government had the authority to take corrective actions had defendants fully disclosed the truth about tobacco related health issues and other material matters. The charged mail and wire fraud offenses are simply not premised on the claim that the defendants intended to defraud the government of money or property.

Moreover, we note that the First and Eighth Circuits have approved application of the mail fraud statute where the parties the defendants intended to deceive were not the same as the parties from whom the defendants intended to obtain money. See, e.g., United States v. Christopher, 142 F. 3d 46, 53-54 (1st Cir. 1998); United States v. Blumeyer, 114 F. 3d 758, 767-68 (8th Cir. 1997). This Court need not resolve whether the mail and wire fraud statutes require "convergence," however, because the consumers of cigarettes are both the individuals the defendants intended to deceive and those from whom the defendants intended to obtain money through a scheme to defraud.

Generally, Rule 9(b) is satisfied when the complaint states the time, place and content of the false representations, the facts misrepresented, and the identity of the party making the misrepresentations. See, e.g., Firestone v. Firestone, 76 F.3d 1210, 1211 (D.C. Cir. 1996); Tuchman v. DSC Communications Corp., 14 F.3d 1061, 1068 (5th Cir. 1994). Although such allegations are sufficient to satisfy Rule 9(b), the rule does not require such allegations. "Plaintiffs are free to use alternative means of injecting precision and some measure of substantiation into their allegations of fraud." Seville Industrial Machinery Corp., 742 F.2d at 791. Accord Mayer v. Dell, 1991 WL 21567 (D.D.C. 1991).

At bottom, the complaint "must provide enough detail about the underlying facts which illustrate that [the defendant's] statements were fraudulent to allow a court to evaluate the claim in a meaningful way." Arazie v. Mullane, 2 F.3d 1456, 1465 (7th Cir. 1993). "Because, however, plaintiffs often cannot know information that is peculiarly in the possession of the defendants, plaintiffs need only provide a statement of facts upon which the plaintiffs' allegations are based." Shields v. Washington Bancorporation, et. al., 1992 WL 88004 (D.D.C. 1992). Accordingly, the "plaintiff need not allege specific evidentiary details needed to prove his claim at trial in order to satisfy Rule 9(b) specificity." Rather, "bare bones averments of fraudulent schemes coupled with plaintiff's allegations that defendant used the mails" in furtherance of the scheme to defraud is sufficient to allege mail fraud and wire fraud predicate acts. Formax, Inc. v. Hostert, 841 F.2d 388, 391 (Fed. Cir. 1988). Cf. Shahmirzadi v. Smith Barney, Harris Upham & Co. 636 F. Supp. 49, 53 (D.D.C. 1985) ("Rule 9 should not be treated as requiring allegations of facts in the pleadings") (citations deleted).

2. Applying the foregoing standards, the RICO fraud allegations, all of which apply to Liggett and the other coconspirators, satisfy the requirements of Rule 9(b). The complaint sets forth considerable specific details regarding the circumstances constituting the scheme to defraud purchasers of cigarettes. For example, the complaint alleges that the defendants made material false and misleading statements denying that there was any proof that smoking cigarettes caused disease, such as lung cancer, when in fact defendants, including Liggett, well knew, based on published literature as well as their own research and internal memoranda, that smoking cigarettes caused disease and posed a variety of health hazards. See Compl., ¶¶ 37-43, 84, 105, 121, 175-177, 204.

The complaint also alleges, see id., ¶¶ 24-69, 177-78, 204, that defendants made material false and misleading statements that they would conduct and disclose unbiased and authenticated research on the health risks of smoking, whereas defendants well knew that they undertook efforts to restrain, suppress and conceal such unbiased and authenticated research. In the same vein, the complaint alleges that defendants falsely represented "that they would fulfill their promise to research and publish their findings about smoking and health by funding independent research through the Tobacco Industry Research Committee ("TIRC"), which was later renamed the Council for Tobacco Research ("CTR")." Id., ¶ 56; see also ¶¶ 57-69, 178. Liggett participated for decades in the design, funding, and control of CTR "Special Projects," and thus, like the other defendants, well knew that "[f]rom its inception, TIRC (later CTR) was essentially a public relations organization designed [by defendants] to counter adverse publicity concerning smoking and health, and not as an independent research organization dedicated to getting to the bottom of the smoking and health controversy." Id., ¶ 60; see also ¶¶ 61-69, 178, 185-198, 204.

Similarly, the complaint alleges that defendants, including Liggett, "falsely denied that they manipulate the nicotine levels and nicotine delivery in their products," id., ¶ 77, 79 & Appendix ¶ 112, whereas defendants well knew that they "control the nicotine content of their products through selective breeding and cultivation of plants for nicotine content and careful tobacco leaf purchasing and blending plans, and control nicotine delivery (i.e., the amount absorbed by the smoker) with various design and manufacture techniques." See also Compl., ¶¶ 78, 80-82, 204).

Furthermore, the complaint alleges that the defendants made material false and misleading statements indicating that low tar/low nicotine cigarettes or "light" cigarettes were less hazardous to smokers' health because "smokers of these products inhale less tar and nicotine than smokers of other cigarettes," whereas defendants well knew that they "deliberately designed these cigarettes in a way that, as actually smoked by most cigarette smokers, they typically do not deliver less tar or nicotine." Compl., ¶ 86; see also ¶¶ 83-91.

Moreover, the complaint alleges that defendants falsely denied that they sought to target the sale of cigarettes to underage youths, whereas defendants well knew that they engaged in various practices to market cigarettes to underage youths, including advertising campaigns designed to particularly appeal to youths, "advertising in stores near high schools, promoting brands heavily during spring and summer breaks, giving cigarettes away at places where young people are likely to be present in large numbers, paying motion picture producers for product placement in motion pictures designed to attract large youth audiences, placing advertisements in magazines commonly read by teenagers, and sponsoring sporting events and other activities

likely to appeal to teenagers." Compl. ¶ 96; see also, ¶¶ 92-103, 181, 204. Indeed, internal documents of defendant R.J. Reynolds Tobacco Company "specifically cited the need to recruit youths as 'replacement smokers.'" Id., ¶ 97.

In sum, contrary to Liggett's specious argument, the complaint particularizes in abundant detail the specific false and misleading representations and statements that Liggett and its coconspirators -- the defendant members of the enterprise -- made with the intent to induce consumers to continue to buy cigarettes that comprise "the circumstances constituting fraud." Moreover, each of the predicate acts of mail and wire fraud alleges the approximate time, place, parties and content of each mailing or wire transmission and identifies the culpable defendant, in full compliance with Rule 9(b). See generally Appendix to Complaint.[23]

[23/] Liggett's contention (L. Mem. p. 32) that some of the alleged misrepresentations involved assertions of "opinion" is beside the point. Courts have repeatedly ruled that, unlike common law fraud, a mail fraud offense does not necessarily require proof of misrepresentations of fact or affirmative false statements, although that would be highly probative of a scheme to defraud. Rather, it is sufficient that the totality of the circumstances, especially material omissions, demonstrates that the defendant intentionally devised or participated in a scheme reasonably calculated to deceive with the purpose of obtaining property from another. See e.g., Neder, 119 S. Ct. at 1840; Richman, 944 F.2d at 331-32 and n. 10; McEvoy Travel Bureau, Inc., 904 F.2d at 791; United States v. Cronic, 900 F.2d 1511, 1513-14 (10th Cir. 1990); Atlas Pile Driving Co., 886 F.2d at 991; United States v. Clausen, 792 F.2d 102, 104-05 (8th Cir. 1986); Blachly v. United States, 380 F.2d 665, 673-74 (5th Cir. 1967); Gregory v. United States, 253 F.2d 104, 109 (5th Cir. 1958); Silverman v. United States, 213 F.2d 405-406 (5th Cir. 1954).

In any event, because the complaint alleges numerous material false statements and misrepresentations of facts that provide an adequate basis for relief, the complaint may not be dismissed under Rule 12(b)(6) even if Liggett were correct that some of the allegations merely involve assertions of "opinion" that may not provide the basis for relief. See cases cited supra, p. 9-10.

Liggett's reliance (L. Mem. p. 32) upon Bennett Enters, Inc. v. Domino's Pizza, Inc., 794 F. Supp. 434, 437 (D.D.C. 1992) and United States ex rel. DMI, Inc. v. Darwin Constr. Co., 750 F. Supp. 536, 541 (D.D.C. 1990), is misplaced since these decisions did not turn on construction of the mail or wire fraud statutes, which are broader than the types of fraud alleged in these

(continued...)

In similar circumstances, courts have repeatedly held that such allegations regarding RICO predicate acts of mail and/or wire fraud were sufficient to satisfy the particularity requirements of Rule 9(b) allegations.[24]

IV

DISGORGEMENT IS A REMEDY AVAILABLE TO THE UNITED STATES UNDER §1964(a)

Liggett argues (L. Mem. pp. 20-23) that 18 U.S.C. § 1964(a) does not authorize the equitable remedy of disgorgement. Relying on United States v. Carson, 52 F.3d 1173 (2d Cir. 1995), Liggett also argues (L. Mem. p. 20) that RICO disgorgement is limited "to the extent that it will 'prevent and restrain' future RICO violations," and that since Liggett has allegedly ceased its charged unlawful activities and withdrawn from the charged RICO enterprise and conspiracy, there is no basis to conclude that Liggett might use illegal profits from past unlawful conduct to promote future illegal conduct. Therefore, Liggett contends that disgorgement of Liggett's past unlawful proceeds is not an available remedy under RICO.

[23/](...continued)
cases.
Moreover, in Bennett Enterprise, Inc., the complaint did not allege when the alleged misrepresentations were made, to whom they were made, or the persons who made them. Further, the complaint's allegations themselves precluded any cognizable claim for relief. Likewise, in Darwin Construction, the complaint did not allege a misrepresentation of a past or existing fact. By contrast, none of these deficiencies are present in the complaint at issue.

[24/]See, e.g., Quaknine v. MacFarlane, 897 F.2d 75, 79-82 (2nd Cir. 1990); Formax, Inc., 841 F.2d at 390-91; Sun Savings and Loan Association v. Dierdorff, 825 F.2d 187, 195-196 (9th Cir. 1987); Seville Industrial Machinery, Corp., 742 F.2d at 790-91; Morley v. Cohen, 610 F. Supp. 798, 814 (D. Md. 1985). See also Firestone, 76 F.3d at 1211.

However, this argument essentially is a reformulation of Liggett's premature effort to inject an affirmative defense into its motion to dismiss (see supra, point I). Liggett's claim fares no better here. Moreover, Liggett's argument is refuted by the language of § 1964(a), its legislative history and governing case law, which make clear that in §1964(a) Congress invested the district courts with broad authority to fashion civil remedies and equitable relief to eliminate corruption of legitimate businesses and to deter future unlawful conduct. The District of Columbia Circuit has noted that the primary purpose of disgorgement is "to deter others from violating the . . . laws" by depriving the wrongdoer of his unlawful proceeds. SEC v. First City Financial Corp., Ltd., 890 F.2d 1215, 1231 (D.C. Cir. 1989). In accordance with this view, all the courts that have decided the issue have held that disgorgement of a wrongdoer's past ill-gotten gains, as sought here, is an essential weapon to effectuate RICO's remedial purpose to restrain under future RICO violations, and squarely falls within the ambit of §1964(a).

1. 18 U.S.C. §1964(a) provides as follows:

> The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter **by issuing appropriate orders, including, but not limited to:** ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for rights of innocent persons. (emphasis added).

By its plain language §1964(a) does not limit the court's remedial authority to the types of equitable relief specifically listed. Indeed, the Senate Committee Report emphasized the expansive and flexible nature of the equitable relief authorized under §1964(a), stating:

> [I]t must be emphasized that these remedies are not exclusive, and that [RICO] seeks essentially an economic, not a punitive goal. However remedies may be fashioned, it is necessary to free the channels of commerce from predatory activities, but there is no intent to visit punishment on any individual; the purpose is civil.
>
> Although certain remedies are set out, the list is not exhaustive, and the only limit on remedies is that they accomplish the aim set out of removing the corrupting influence and make due provisions for the rights of innocent persons.

S. Rep. No 617, 91st Cong, 1st Sess. 81 and 160 (1969). Accord H.R. Rep. No 1549, 91st Cong., 2d Sess. 57(1970). Moreover, the Committee Report noted that to achieve RICO's remedial purposes, the courts would need broad equitable powers:

> Where an organization is acquired or run by defined racketeering methods, then the persons involved can be legally separated from the organization, either by the criminal law approach . . . or through a civil law approach of equitable relief broad enough to do all that is necessary to free the channels of commerce from all illicit activity.

S. Rep. No. 617, 91st Cong., 1st Sess. at 79 (1969).

In accordance with RICO's legislative history, the Supreme Court has repeatedly recognized that the aims of Congress in enacting RICO were: (1) to create "enhanced sanctions and new remedies" of unprecedented scope, including civil remedies and equitable relief, and (2) to eliminate not only organized crime's unlawful activities, but also corruption of legitimate

businesses and the channels of commerce.[25] The Court further identified that the "aim" of RICO's "civil remedies" is "to divest the [enterprise] of the fruits of its ill gotten gains." Turkette, 452 U.S. at 585. Recognizing these aims, the Supreme Court has repeatedly noted Congress' explicit direction that RICO "shall be liberally construed to effectuate its remedial purposes."[26] In that regard, the Supreme Court has pointedly observed: "[i]ndeed, if Congress' liberal-construction mandate is to be applied anywhere, it is in § 1964, where RICO's remedial purposes are most evident." Sedima, S.P.R.L., 473 U.S. at 492, n. 10.

Thus, contrary to Liggett's argument, RICO's legislative history compels the conclusion that disgorgement of a wrongdoer's proceeds of his past unlawful activities is essential to achieve a central remedial purpose of RICO — to prevent future violations of RICO by depriving a wrongdoer "of the fruits of [his] ill-gotten gains." Therefore, Congress intended the district courts to have the authority to employ disgorgement among RICO's broad arsenal of equitable remedies under § 1964(a), as requested here.

2. Even if Congress had not made plain its intent to authorize district courts to issue all appropriate equitable relief, the principles of statutory construction firmly support this interpretation of §1964(a). For example, in Porter v. Warner Holding Co., 328 U.S. 395 (1946) the Supreme Court stated:

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[25] United States v. Turkette, 452 U.S. 576, 589-93 (1981); see also Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 487-88 (1985); Russello v. United States, 464 U.S. 16, 26-28 (1983).

[26] Russello, 464 U.S. at 27, quoting § 904(a) of Pub. L. 91-452, 84 Stat. 947 (Congress' statement of finding and purpose in enacting RICO).

> Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And since the public interest is involved in a proceeding of this nature, those equitable powers assume an even broader and more flexible character than when only a private controversy is at stake. Power is thereby resident in the District Court, in exercising this jurisdiction, 'to do equity and to mould each decree to the necessities of the particular case.'
>
> ***
>
> [T]he comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. **Unless a statute in so many words or by necessary and inescapable inference restricts the court's jurisdiction in equity. The full scope of that jurisdiction is to be recognized and applied.** 'The great principles of equity, securing complete justice, should not be yielded to light inferences or doubtful conclusions.'

328 U.S. at 398 (citation deleted) (emphasis added).

Section 1964(a) does not clearly limit the court's exercise of equity jurisdiction to the remedies explicitly set forth; therefore, the full scope of equitable jurisdiction must be applied, including disgorgement.[27] Not surprisingly, in accordance with RICO's legislative history and these principles of statutory construction, all the courts that have considered the issue have consistently held that disgorgement is a remedy available to the United States under § 1964(a).[28]

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[27] Accord California v. American Stores Co., 495 U.S. 271, 281-82 (1990); First City Financial Corp., Ltd., 890 F.2d at 1230; F.T.C. v. Gem Merchandising Corp., 87 F.3d 466, 469 (11th Cir. 1996). See also Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288, 291-92 (1960). ("When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purpose. As this Court has long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of legislature.' Clark v. Smith, 38 U.S. (13 Pet.) 195, 203, 10 L.Ed. 123.")

[28] See, e.g., Carson, 52 F.2d at 1180-82; United States v. Private Sanitation Industry Ass'n., 914 F. Supp. 895, 900-01 (E.D.N.Y. 1996); United States v. Private Sanitation Industry

(continued...)

3. Liggett's attempts to avoid the force of the foregoing authority fail.

a. Contrary to Liggett's assertion (L. Mem. p. 20, n. 9), there is no basis for concluding that disgorgement under RICO is narrower than disgorgement under the securities laws on the ground that the primary purpose of disgorgement under the securities laws, unlike RICO, is deterrence. First, as discussed above, this claim ignores the language of the RICO statute and its legislative history, which demonstrate that Congress intended RICO to have broad remedial scope. See Sedima, S.P.R.L., 473 U.S. at 492, n.10. To argue that the remedies available under civil RICO should be narrower than those available to a court considering other forms of injunctive relief strains credulity. It is noteworthy that the District of Columbia Circuit and other courts have held that the general injunctive provisions of the securities laws authorize district courts pursuant to their equity powers to grant disgorgement as a remedy for past violations even though these provisions do not, like RICO, explicitly enumerate disgorgement as an available remedy.[29]

Second, disgorgement under RICO serves purposes similar to disgorgement pursuant to the securities laws. The primary purpose of disgorgement under the securities laws is to deter or

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[28/](...continued)
Ass'n., 899 F. Supp. 974, 983-84 (E.D.N.Y. 1994), aff'd 47 F.3d 1158 (2nd Cir. 1995);United States v. Private Sanitation Industry Ass'n., 811 F. Supp. 808, 818 (E.D.N.Y. 1992), aff'd., 995 F.2d 375 (2d Cir. (1993); International Brotherhood of Teamsters, 708 F. Supp. at 1408; United States v. Bonanno Organized Crime Family, 683 F. Supp. 1411, 1446-49 (E.D.N.Y. 1988), aff'd 879 F.2d 20 (2nd Cir. 1989).

[29/] See e.g., First City Financial Corp., Ltd., 890 F.2d at 1230; S.E.C. v. Materia, 745 F.2d 197, 200-201 (2nd Cir. 1984); Hunt, 591 F.2d at 1221-22; S.E.C. v. Manor Nursing Ctrs., Inc., 458 F.2d 1082, 1104-05 (2nd Cir. 1972); cf. S.E.C. v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307-08 (2nd Cir. 1971).

prevent others from violating the securities laws by depriving the wrongdoer of his ill-gotten gains.[30] Likewise, as we have demonstrated, a significant purpose of RICO's equitable relief, including disgorgement, is to deter or prevent future violations of RICO by depriving a wrongdoer of his ill-gotten gains. See 18 U.S.C. § 1964(a), and supra, pp. 32-34.

In its argument, Liggett fundamentally misunderstands the relationship between disgorgement and deterrence. The primary purpose of disgorgement is not to deter the particular litigant who is the subject of disgorgement from committing future unlawful conduct. Rather, as noted above, the primary purpose of disgorgement is to deter **others** from committing future unlawful conduct by depriving the wrongdoer of his ill-gotten gains and, thereby, preventing unjust enrichment. See cases cited supra, n.30. Therefore, contrary to Liggett's argument, a wrongdoer may not keep his ill-gotten gains merely because he has ceased his unlawful conduct and provides assurances that he will not commit similar crimes in the future. Liggett's interpretation would not deter others from committing crimes; rather, it would offer an invitation to commit crime because it would allow the wrongdoer to keep vast sums of ill-gotten gains.

b. Relying on the Second Circuit's decision in Carson, Liggett also argues (L. Mem. pp. 21-22) that the complaint is defective for failure to allege that Liggett is using its past ill-gotten gains "to fund or promote the illegal [RICO enterprise] or as capital available for that purpose." (internal quotation deleted). However, Carson did not even address, much less turn on, the pleading requirements for a complaint. Indeed, even under Liggett's interpretation of the

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[30] See e.g., First City Financial Corp., Ltd., 890 F.2d at 1230-31; Manor Nursing Ctrs., Inc., 458 F.2d at 1104-05.

opinion in Carson, the United States would be entitled to disgorgement of some money,[31] and thus dismissal would not be appropriate at this stage. Accordingly, any determination of the amount of money to be disgorged is not appropriate at this stage of the proceedings.[32]

Because Carson provides no basis for dismissal, and because the issues it presents are not properly raised at this stage of the litigation, we do not fully address here the Second Circuit's reasoning. If Carson is raised at an appropriate juncture, the United States will demonstrate that the limitations on equitable relief found appropriate in that case are inconsistent with the

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[31/] See, e.g., Private Sanitation Industry Ass'n., 914 F. Supp. at 901, holding that under Carson, the United States was entitled to disgorgement of all the corporate unlawful proceeds "[b]ecause the corporate defendants in this case will continue to be involved in the Long Island carting industry even if the government's requested relief is granted, the monies these corporations gained illegally obviously constitute capital available for the purpose of funding or promoting illegal conduct."

[32/] See, e.g., First American Corp v. Al-Nahyan, 17 F. Supp. 2d 10, 29-30 (D.D.C. 1998) ("[T]he Court finds that [disgorgement] will be granted if the facts at the trial support a breach of fiduciary claim. The thorny issue of what must be disgorged will be take up if and when it becomes ripe."); International Brotherhood of Teamsters, 708 F. Supp. at 1393, 1402 ("The issue of the appropriate scope for relief, if any is warranted by the proof adduced at a trial, should be determined by court in its discretion after a hearing. . . . At this stage [12(b)(6) motion], the relief requested cannot mandate a dismissal of the [RICO] complaint. If the government prevails at trial, then it will be the court's responsibility to fashion an equitable remedy to restrain future violations of RICO"); Pratt v Rowland, 769 F. Supp. 1128, 1134 (N.D. Cal. 1991) ("A motion to dismiss directed at the form of relief requested is improper."); Bonanno Organized Crime Family, 683 F. Supp. at 1441-42 (holding that the defendants' constitutional challenges to the government's requested equitable relief under civil RICO were "premature" prior to trial because "[t]he availability of an injunctive relief will depend on the government's proof, and the court has broad equitable powers under 18 U.S.C. § 1964 to fashion any injunctive relief to avoid constitutional infirmities.").

Indeed, in Carson, 52 F.3d at 1182, the Second Circuit vacated the disgorgement order entered after a bench trial and "remand[ed] to the district court for a determination as to which disgorgement amounts, if any, were intended solely to 'prevent and restrain' future RICO violations." Clearly Liggett's disgorgement argument based on Carson may not be resolved at this stage of the proceedings.

remedial nature of disgorgement, which, as the District of Columbia Circuit has said, "is an equitable remedy designed to deprive a wrongdoer of his unjust enrichment and to deter others from violating the . . . laws." First City Financial Corp., Ltd., 890 F.2d at 1230. Carson's limitation on the scope of disgorgement would significantly impair disgorgement's deterrent effect because it could allow a wrongdoer to retain significant amounts of ill-gotten gains. The Second Circuit's limitation is contrary to established canons of statutory construction regarding the scope of courts' equitable powers,[33] and cannot be reconciled with the legislative history of § 1964(a), which establishes that RICO's equitable remedies were designed to eliminate corruption from the channels of commerce and to "divest [an enterprise] of the fruits of its ill-gotten gains." Turkette, 452 U.S. at 585. Moreover, Carson is inconsistent with the interpretations of other statutes affording equitable relief that is forward looking, which have not imposed Carson's limitation on the scope of disgorgement. See cases cited supra, n.33.

c. Finally, Liggett suggests (L. Mem. p. 23, n.12) that the four-year statute of limitations that applies to private civil RICO actions for treble damages should apply to civil RICO lawsuits for equitable relief by the United States. However, it is well established that the statute of limitations and the doctrine of laches do not apply to equitable suits by the government to

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[33/] See, e.g., FTC v. Gem Merchandising Corp., 87 F.3d 466, 468-69 (11th Cir. 1996); Commodity Futures Trading Com'n v. American Metals Exchange Corp., 991 F.2d 71, 76-77 (3rd Cir. 1993); First City Financial Corp., Ltd., 890 F.2d at 1228-32; Commodity Futures Trading Com'n v. Co Petro Marketing Group, Inc., 680 F.2d 573, 583-84 (9th Cir. 1982); Interstate Commerce Com'n v. B&T Transp. Co., 613 F.2d 1182, 1183-86 (1st Cir. 1980); SEC v. Texas Gulf Sulphur Co., 446 F.2d 1301, 1307-08 (2nd Cir. 1971).

enforce a public right or to protect the public's interest.[34] In accordance with this authority, every court that has decided the issue has held that the statute of limitations and doctrine of laches do not apply to civil RICO lawsuits for equitable relief brought by the United States as involved here.[35] There is no justification for this Court to depart from this firmly rooted body of authority.

CONCLUSION

For the foregoing reasons and the reasons stated in our response to Liggett's codefendants' Memorandum of Law, which we incorporate by reference, Liggett's motion to dismiss Counts Three and Four of the complaint should be denied in all respects.

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[34/] See, e.g., Nevada v. United States, 463 U.S. 110, 141 (1983); Holmberg v. Armbrecht, 327 U.S. 392, 396 (1946); United States v. Summerlin, 310 U.S. 414, 416 (1990); Guaranty Trust Co. v. United States, 304 U.S. 126, 132 (1938); Utah Power & Light Co. v. United States, 243 U.S. 389, 409 (1917).

[35/] See United States v. Local 1804-1, International Longshoreman's Ass'n, 831 F. Supp. 177, 186 n.8 (S.D.N.Y. 1993); Private Sanitation Industry Ass'n., 793 F. Supp. at 1152; International Brotherhood of Teamsters, 708 F. Supp. at 1402; Bonanno Organized Crime Family, 683 F. Supp. at 1458.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that on this 25th day of February, 2000, I caused to be placed in the United States mail (first-class mail, postage pre-paid) and/or delivered by hand as specified, a copy of

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